Supreme Court, U.S.
FILED
DEC 2 - 2015
OFFICE OF THE CLERK

No. 14-1458

# In the Supreme Court of the United States

MHN GOVERNMENT SERVICES, INC., AND MANAGED HEALTH NETWORK, INC.,

*Petitioners,*

v.

THOMAS ZABOROWSKI, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit**

## BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KATE COMERFORD TODD
WARREN POSTMAN
*U.S. Chamber Litigation Center, Inc.*
*1615 H Street, NW*
*Washington, DC 20062*
*(202) 463-5337*

ANDREW J. PINCUS
*Counsel of Record*
ARCHIS A. PARASHARAMI
*Mayer Brown LLP*
*1999 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*
*apincus@mayerbrown.com*

*Counsel for* Amicus Curiae

# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

INTEREST OF THE *AMICUS CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 4

California's *Armendariz* Rule Discriminates Against Arbitration Agreements In Violation Of The FAA ..... 4

A. The FAA Requires States To Put Arbitration On At Least Equal Footing With Other Contract Provisions. ..... 5

B. California Treats Arbitration Agreements Less Favorably Than Other Contracts When Deciding Whether To Sever Invalid Provisions ..... 7

C. The *Armendariz* Decision As A Whole Rests On Impermissible Hostility To Arbitration ..... 13

CONCLUSION ..... 19

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*A&M Produce Co.* v. *FMC Corp.*,
135 Cal. App. 3d 473 (Cal. Ct. App. 1982) ..... 11

*Adair v. Stockton Unified Sch. Dist.*,
162 Cal. App. 4th 1436 (2008) ..... 7

*Allied-Bruce Terminix Cos.* v. *Dobson*,
513 U.S. 265 (1995) ..... 5, 6

*American Express Co.* v. *Italian Colors Rest.*,
133 S. Ct. 2304 (2013) ..... 1, 16

*Armendariz v. Found. Health Psychcare Services, Inc.*,
6 P.3d 669 (Cal. 2000) ..... *passim*

*Arthur Andersen LLP* v. *Carlisle*,
556 U.S. 624 (2009) ..... 6

*AT&T Mobility LLC* v. *Concepcion*,
563 U.S. 333 (2011) ..... *passim*

*Birbrower, Montalbano, Condon & Frank, P.C.* v. *Superior Court*,
949 P.2d 1 (Cal. 1998) ..... 8

*Bradford* v. *Rockwell Semiconductor Sys., Inc.*,
238 F.3d 549 (4th Cir. 2001) ..... 18

## TABLE OF AUTHORITIES—continued

**Page(s)**

*Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006) ..... 6

*Carmona* v. *Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74 (2014) ..... 9, 10

*DIRECTV, Inc.* v. *Imburgia*, No. 14-462 (U.S. argued Oct. 6, 2015) ..... 1, 14

*Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681 (1996) ..... 5, 6, 17

*EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002) ..... 3, 5, 13

*Fields* v. *QSP, Inc.*, 2012 WL 2049528 (C.D. Cal. June 4, 2012) ..... 8

*Fitz* v. *NCR Corp.*, 118 Cal. App. 4th 702 (2004) ..... 11

*FLF, Inc.* v. *Barney & Barney, LLC*, 2012 WL 4897750 (Cal. Ct. App. Oct. 16, 2012) (unpublished) ..... 8

*Foley* v. *Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) ..... 17

**TABLE OF AUTHORITIES—continued**

**Page(s)**

*Gerald F. Moore, P.C.* v. *Orthodontic Ctrs.*,
2002 WL 32351 (Cal. Ct. App. Jan. 11, 2002) (unpublished) ..... 11

*Gilmer* v. *Interstate/Johnson Lane Corp.*,
500 U.S. 20 (1991) ..... 12, 15, 16

*Green Tree Fin. Corp.-Ala.* v. *Randolph*,
581 U.S. 79 (2000) ..... 10, 18

*Greenlake Capital, LLC* v. *Bingo Invs., LLC*,
185 Cal. App. 4th 731 (2010) ..... 8

*In re FirstMerit Bank, N.A.*,
52 S.W.3d 749 (Tex. 2001) ..... 17

*In re Marriage of Facter*,
212 Cal. App. 4th 967 (2013) ..... 7, 9

*KPMG LLP* v. *Cocchi*,
132 S. Ct. 23 (2011) (per curiam) ..... 7

*Kuhlman* v. *New Santana Band, Inc.*,
2006 WL 1589716 (Cal. Ct. App. June 12, 2006) ..... 11

*LaPrade* v. *Kidder, Peabody & Co., Inc.*,
246 F.3d 702 (D.C. Cir. 2001) ..... 18

## TABLE OF AUTHORITIES—continued

**Page(s)**

*Lhotka v. Geographic Expeditions, Inc.*,
181 Cal. App. 4th 816 (2010) ..... 9, 10

*Mailand* v. *Burckle*,
572 P.2d 1142 (Cal. 1978) ..... 11

*Marathon Entm't, Inc.* v. *Blasi*,
174 P.3d 741 (Cal. 2008) ..... 7, 8, 11

*Marmet Heath Care Ctr., Inc.* v. *Brown*,
132 S. Ct. 1201 (2012) (per curiam) ..... 6

*Martinez v. Master Protection Corp.*,
118 Cal. App. 4th 107 (2004) ..... 9

*MKB Mgmt., Inc.* v. *Melikian*,
184 Cal. App. 4th 796 (2010) ..... 7, 8

*Murphy* v. *DIRECTV, Inc.*,
724 F.3d 1218 (9th Cir. 2013) ..... 14

*Musnick* v. *King Motor Co.*,
325 F.3d 1255 (11th Cir. 2003) ..... 18

*O'Hare* v. *Mun. Res. Consultants*,
107 Cal. App. 4th 267 (2003) ..... 9

*Oblix, Inc.* v. *Winiecki*,
374 F.3d 488 (7th Cir. 2004) ..... 17

*Ontiveros* v. *DHL Express (USA), Inc.*,
164 Cal. App. 4th 494 (2008) ..... 9

## TABLE OF AUTHORITIES—continued

**Page(s)**

*Oxford Health Plans LLC* v. *Sutter*,
133 S. Ct. 2064 (2013) ..... 1

*Perry* v. *Thomas*,
482 U.S. 483 (1987) ..... *passim*

*Pinedo* v. *Premium Tobacco Stores, Inc.*,
85 Cal. App. 4th 774 (2000) ..... 9

*Preston* v. *Ferrer*,
552 U.S. 346 (2008) ..... 5, 6, 14

*Rent-A-Center, W., Inc.* v. *Jackson*,
561 U.S. 63 (2010) ..... 6

*Samaniego* v. *Empire Today LLC*,
205 Cal. App. 4th 1138 (2012) ..... 9

*Scherk* v. *Alberto-Culver Co.*,
417 U.S. 506 (1974) ..... 6

*Shopoff & Cavallo LLP* v. *Hyon*,
167 Cal. App. 4th 1489 (2008) ..... 8

*Soto* v. *State Indus. Prods., Inc.*,
642 F.3d 67 (1st Cir. 2011) ..... 17

*Southland Corp.* v. *Keating*,
465 U.S. 1 (1984) ..... 5, 6, 13

*Trivedi* v. *Curexo Tech. Corp.*,
189 Cal. App. 4th 387 (2010) ..... 9

## TABLE OF AUTHORITIES—continued

**Page(s)**

*Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989) ..... 6

*Wertheim, LLC* v. *Currency Corp.*, 2012 WL 1854944 (Cal. Ct. App. May 22, 2012) (unpublished) ..... 11

*Williams* v. *Cigna Fin. Advisors Inc.*, 197 F.3d 752 (5th Cir. 1999) ..... 18

**CONSTITUTION AND STATUTES**

Federal Arbitration Act, 9 U.S.C. §§ 1-16 ..... *passim*

Cal. Civ. Code
§ 1599 ..... 7
§ 1670.5 ..... 8

**OTHER AUTHORITIES**

Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, Hastings Bus. L.J. 39 (2006) ..... 14

**TABLE OF AUTHORITIES—continued**

**Page(s)**

Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buffalo L. Rev. 185 (2004) ..... 14

## BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

---

## INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.[1]

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. See, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, No. 14-462 (U.S. argued Oct. 6, 2015); *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).

Arbitration agreements allow the parties to replace expensive, time-consuming, and contentious in-court litigation with speedy, inexpensive, fair, and often far less adversarial dispute-resolution proce-

---

[1] The Chamber affirms that no counsel for a party authored this brief in whole or in part and that no person other than the Chamber, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties' consents to the filing of *amicus* briefs are on file with the Clerk's office.

dures. For these reasons, many of the Chamber's members and affiliates routinely employ arbitration agreements as a key element in millions of their contractual relationships. As Congress intended when it enacted the Federal Arbitration Act, 9 U.S.C. §§ 1-16, the result has been not only conservation of judicial resources but also substantial litigation cost savings for the parties, which in turn have allowed for lower prices for consumers, higher wages for employees, and benefits for the national economy as a whole.

The many benefits of arbitration agreements—secured by the FAA's prohibition against discriminatory treatment of arbitration contracts—are threatened when courts impose or enforce state-law rules that do not apply uniformly to all contracts or are inconsistent with the strong federal presumption in favor of arbitration. Although this Court has consistently condemned such hostility to arbitration, some courts have persisted in their efforts to circumvent federal law. Accordingly, the Chamber has a strong interest in ensuring that decisions like the one here that are starkly inconsistent with this Court's FAA precedents are not allowed to stand.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has observed that "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 342 (2011). Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration

agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted).

The special severability rule set forth in *Armendariz* v. *Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000)—on which the court of appeals relied in this case—is a discriminatory legal rule prohibited by the FAA. *Armendariz* holds that whenever an "arbitration agreement contains more than one unlawful provision," a trial court may strike down the agreement in its entirety rather than severing the unlawful clauses. *Id.* at 696-97. California courts have repeatedly applied this mechanical rule to invalidate arbitration agreements.

The *Armendariz* rule stands in stark contrast to California's approach to severability outside the arbitration context. When faced with contracts that do not involve arbitration, California courts stress the importance of case-by-case evaluation and apply a liberal policy in favor of severability. *Armendariz* thus, in purpose and effect, treats arbitration agreements less favorably than other contract terms—the precise discriminatory treatment forbidden by the FAA.

The Ninth Circuit in this case applied *Armendariz*'s severability rule to invalidate an arbitration agreement solely on the ground that it contained multiple provisions found to be invalid. This Court should reverse the holding below, reaffirm that the FAA prohibits state law from singling out arbitration agreements for disfavored treatment, and require the court below to apply to the arbitration contract at issue here California's generally applicable pro-severability principles.

## ARGUMENT

### California's *Armendariz* Rule Discriminates Against Arbitration Agreements In Violation Of The FAA.

The FAA "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (emphasis added) (quoting 9 U.S.C. § 2; emphasis added by the Court). While courts may refuse to enforce arbitration agreements based upon rules of contract law that apply to all contracts, they may not apply contract-law doctrines in a manner that discriminates against arbitration clauses.

The court below violated this fundamental precept by applying a virtually automatic rule—the *Armendariz* severability rule—that allows a court to strike down an entire arbitration agreement on the basis of two invalid provisions without undertaking the severability analysis that applies to non-arbitration contracts. The *Armendariz* rule was born out of an arbitration agreement, has been applied only to arbitration agreements, and is overwhelmingly likely to affect only arbitration agreements. In short, it singles out arbitration agreements for less favorable treatment than other contracts.

This severability rule is just one of a broad set of arbitration-only rules announced by the California Supreme Court in *Armendariz* that are each preempted by the FAA. The continuing application of *Armendariz* in federal and state courts in California amplifies California's traditional, and continuing, hostility towards arbitration. This Court should

(once again) reject California's discriminatory treatment of arbitration contracts and reaffirm that the FAA requires States to determine the meaning and enforceability of arbitration agreements by applying generally applicable contract law principles, and prohibits rules holding arbitration agreements to different, more restrictive standards.

### A. The FAA Requires States To Put Arbitration On At Least Equal Footing With Other Contract Provisions.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *Waffle House*, 534 U.S. at 289 (internal quotation marks omitted); see also, *e.g.*, *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008) ("Section 2 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner.") (quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984)); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (FAA "seeks broadly to overcome judicial hostility to arbitration agreements").

The heart of the FAA is Section 2, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry*, 482 U.S. at 489 (quoting 9 U.S.C. § 2). "By enacting § 2, * * * Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk* v. *Alberto-*

*Culver Co.*, 417 U.S. 506, 511 (1974)). State-law rules that discriminate against arbitration are flatly forbidden.[2]

A state-law rule discriminates against arbitration not only when it "prohibits outright the arbitration of a particular claim," but also when it is "applied in a fashion that disfavors arbitration" or has a "disproportionate impact on arbitration." *Concepcion*, 563 U.S. at 341-42. Put another way, the FAA permits States to apply state-law principles of contract interpretation and enforcement to an arbitration agreement as long as those rules "govern * * * the validity, revocability, and enforceability of contracts *generally*." *Perry*, 482 U.S. at 492 n.9 (emphasis added). "A court may not * * * construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Ibid.*; see also, *e.g.*, *Doctor's Assocs.*, 517 U.S. at 686-88; *Allied-Bruce*, 513 U.S. at 281.

In sum, Section 2's "substantive command" is that state and federal courts must "treat[]" arbitration agreements "like all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006); see also, *e.g.*, *Marmet Heath Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam)

---

[2] See, *e.g.*, *Marmet Heath Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *Concepcion*, 131 S. Ct. at 1745; *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67-68 (2010); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009); *Preston*, 552 U.S. at 356; *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *Allied-Bruce*, 513 U.S. at 270-271; *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989); *Perry*, 482 U.S. at 492 n.9; *Southland*, 465 U.S. at 10-11 & 16 n.11.

(summary reversal); *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (summary reversal).

### B. California Treats Arbitration Agreements Less Favorably Than Other Contracts When Deciding Whether To Sever Invalid Provisions.

California law generally "take[s] a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *In re Marriage of Facter*, 212 Cal. App. 4th 967, 987 (2013) (quoting *Adair* v. *Stockton Unified Sch. Dist.*, 162 Cal. App. 4th 1436, 1450 (2008)). This view is codified in two sections of the California Civil Code.

First, Section 1599 provides that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Cal. Civ. Code § 1599. The California Supreme Court has explained that "[n]otwithstanding any * * * illegal[]" contract provision, Section 1599 "preserves and enforces any lawful portion of a parties' contract that *feasibly* may be severed." *Marathon Entm't, Inc.* v. *Blasi*, 174 P.3d 741, 750-51 (Cal. 2008) (emphasis added). In construing this provision, California courts have recognized that severance has two purposes: "to prevent parties from gaining undeserved benefit or suffering undeserved detriment * * * [and] more generally, * * * to *conserve a contractual relationship* if to do so would not be condoning an illegal scheme." *MKB Mgmt., Inc.* v. *Melikian*, 184 Cal. App. 4th 796, 803-04 (2010) (emphasis added; internal quotation marks omitted).

Second, Section 1670.5(a) codifies the common law approach as applied to a contract clause that is invalid because it was unconscionable at the time it was made. In that circumstance, "the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Cal. Civ. Code § 1670.5(a). Section 1670.5 thus endows courts with extensive discretion, making the decision whether and what provisions to sever "equitable and fact specific" and requiring "case-by-case consideration." *Marathon*, 174 P.3d at 755.

That is the theory, at any rate. In practice, whether these principles are honored depends entirely on whether an arbitration agreement is at issue.

California courts frequently engage in equitable and fact specific analysis in non-arbitration cases, with a liberal preference for severability. See *Birbrower, Montalbano, Condon & Frank, P.C.* v. *Superior Court*, 949 P.2d 1, 12-13 (Cal. 1998); *FLF, Inc.* v. *Barney & Barney, LLC*, 2012 WL 4897750, at *12 (Cal. Ct. App. Oct. 16, 2012) (unpublished); *Greenlake Capital, LLC* v. *Bingo Invs., LLC*, 185 Cal. App. 4th 731, 739-40 (2010); *MKB Mgmt.*, 184 Cal. App. 4th at 803-805; *Shopoff & Cavallo LLP* v. *Hyon*, 167 Cal. App. 4th 1489, 1523-24 (2008); *Fields* v. *QSP, Inc.*, 2012 WL 2049528, at *10 (C.D. Cal. June 4, 2012).

But the approach is very different when the agreements at issue involve arbitration. In those cases, California courts instead apply a different rule that discourages severance and encourages courts to invalidate arbitration agreements in their entirety—

and virtually always results in the invalidation of the entire arbitration agreement.

The source of this rule is *Armendariz* v. *Foundation Health Psychcare Services*, in which the California Supreme Court held that refusal to sever is proper any time an "arbitration agreement contains more than one unlawful provision." 6 P.3d at 696-97. "Such multiple defects," the court said, "indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Id.* at 697. The trial court may accordingly conclude that such an agreement "is permeated by an unlawful purpose" as a matter of California law and is therefore wholly unenforceable. *Ibid.*

California courts mechanically apply *Armendariz*'s holding by counting the number of invalid provisions and proceeding to hold the entire arbitration contract unenforceable—and they do so consistently. In *Ontiveros* v. *DHL Express (USA), Inc.*, for example, the California Court of Appeal upheld the trial court's refusal to sever because "at least three provisions of the arbitration agreement are substantively unconscionable." 164 Cal. App. 4th 494, 515 (2008). See also, *e.g.*, *Carmona* v. *Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74, 90 (2014); *Samaniego* v. *Empire Today LLC*, 205 Cal. App. 4th 1138, 1149 (2012); *Trivedi* v. *Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 398 (2010); *Lhotka* v. *Geographic Expeditions, Inc.*, 181 Cal. App. 4th 816, 826 (2010); *Martinez* v. *Master Protection Corp.*, 118 Cal. App. 4th 107, 119 (2004); *O'Hare* v. *Mun. Res. Consultants*, 107 Cal. App. 4th 267, 282 (2003); *Pinedo* v. *Premium Tobacco Stores, Inc.*, 85 Cal. App. 4th 774, 780-81 (2000).

None of these cases so much as cites California's "liberal view" favoring severance (*Facter*, 212 Cal. App. 4th at 987), much less applies it. None meaningfully analyzes whether severance is possible or whether it would serve the interests of justice. They begin and end with *Armendariz*. Nor could they apply such an approach and reach the same result—after all, in the vast majority of cases, any conclusion that enforcement of an arbitration agreement *without* unconscionable provisions conflicts with the interest of justice would itself be preempted by the FAA.

This parsimonious approach to severance—which California eschews outside the arbitration context—rests expressly on the California courts' distaste for arbitration agreements. In the words of *Armendariz*, arbitration is "an inferior forum that works to the employer's advantage." 6 P.3d at 697. This Court has warned against just this sort of "generalized attack[] on arbitration that rest[s] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 89-90 (2000) (internal quotation marks omitted).

*Armendariz* recited that under its rule, "arbitration agreements are neither favored nor disfavored, but simply placed on an equal footing with other contracts." 6 P.3d at 698. But that statement cannot conceal the clear reality: the same lower courts that mechanically apply the "multiple defects" rule describe it as applying to arbitration in particular rather than as stating a generic contractual test. See, *e.g.*, *Carmona*, 226 Cal. App. 4th at 90 ("When an arbitration agreement contains multiple unconscionable provisions * * *."); *Lhotka*, 181 Cal. App. 4th at 826 ("An

arbitration agreement can be considered permeated by unconscionability if * * * *'"); *Kuhlman* v. *New Santana Band, Inc.*, 2006 WL 1589716, at *11 (Cal. Ct. App. June 12, 2006) (unpublished) ("*Armendariz* established that more than one objectionable term in an arbitration agreement weighs against severance."); *Fitz* v. *NCR Corp.*, 118 Cal. App. 4th 702, 726 (2004) ("In *Armendariz* the California Supreme Court held that more than one unlawful provision in an arbitration agreement weighs against severance.").

And California courts in non-arbitration contexts do not appear to invoke *Armendariz* to treat the presence of more than one invalid provision as a per se basis for declaring entire contracts invalid. See *Wertheim, LLC* v. *Currency Corp.*, 2012 WL 1854944, at *14-15 (Cal. Ct. App. May 22, 2012) (unpublished) (multiple provisions in assignment agreements were void, but severable; citing *Marathon*); *Gerald F. Moore, P.C.* v. *Orthodontic Ctrs.*, 2002 WL 32351, at *7-9 (Cal. Ct. App. Jan. 11, 2002) (unpublished) (provisions dictating operating hours and requiring full-time employment unlawful, but severable in light of contractual severability provision); *A&M Produce Co.* v. *FMC Corp.*, 135 Cal. App. 3d 473, 481-82 (1982); *Mailand* v. *Burckle*, 572 P.2d 1142, 1144-45 (Cal. 1978).

Indeed, a search of publicly available decisions in the Westlaw database does not reveal *a single case* in which a California court—state or federal—has cited *Armendariz*'s "multiple defects" language outside of the arbitration context.

Of course, as the dissenting judge below pointed out, *some* arbitration agreements may be so fundamentally unfair that severance is improper. Pet. App.

10a-11a n.1 (Gould, J., concurring in part and dissenting in part) ("I recognize that one can imagine an arbitration agreement where the number and content of unconscionable provisions are so pervasive that they rebut the presumption in favor of severance."). The same is true of other types of contracts.

But *Armendariz*'s per se rule impermissibly stacks the deck against arbitration agreements, heavily weighting the analysis against severability and pretermitting the equitable analysis that applies to non-arbitration contracts. That is why the *Armendariz* rule violates Section 2's anti-discrimination mandate.

In fact, *Armendariz*'s blanket rule not only discriminates against arbitration, but also threatens to undermine the very features—"simplicity, informality, and expedition" (*Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991))—that the Supreme Court has said make this form of dispute resolution so valuable in the first place. Arbitration contracts, by their nature, will often contain a variety of procedural provisions tailoring the arbitration process to the parties' needs. As this Court recognized in *Concepcion*, this opportunity for customization is one of arbitration's main advantages:

> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.

563 U.S. at 344-45. Under *Armendariz*, however, each one of these procedures is a possible source of invalidity—especially given the jaundiced eye with which California courts view arbitration agreements—and two unenforceable procedures will for practical purposes void the entire agreement. The likely result if the *Armendariz* rule were upheld would be arbitration agreements that are less flexible and more court-like, undermining the basic purposes of the FAA.

### C. The *Armendariz* Decision As A Whole Rests On Impermissible Hostility To Arbitration

California has frequently run afoul of the FAA's basic command that arbitration agreements should be placed "upon the same footing as other contracts." *Waffle House*, 534 U.S. at 289 (internal quotation marks omitted). Time and again, this Court has had to intervene.

In 1984, for example, the Court struck down a California law that had been interpreted by the California Supreme Court to prohibit parties from agreeing to arbitrate claims under the California Franchise Investment Law. *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984).

Three years later, the Court invalidated a state provision providing that wage collection actions under the California Labor Law could be maintained without regard to the existence of a private arbitration agreement. *Perry* v. *Thomas*, 482 U.S. 483, 492 (1987).

Most recently, the Court found that California's rule that class-action waivers in arbitration agreements were unconscionable was inconsistent with

the FAA and was accordingly preempted. *Concepcion*, 563 U.S. at 352; see also *Preston*, 552 U.S. at 356 (FAA preempted California law granting state Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate).[3]

The Ninth Circuit's uncritical adoption of *Armendariz* will exacerbate this unfortunate trend. This Court has already recognized that it is "easy to imagine" examples as to which purportedly neutral defenses like unconscionability will "[i]n practice" be applied with "a disproportionate impact on arbitration agreements." *Concepcion*, 563 U.S. at 342. And it has observed that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Ibid.* (citing Stephen A. Broome, *An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54, 66 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buffalo L. Rev. 185, 186–87 (2004)).

*Armendariz* turbocharges such dubious unconscionability holdings by allowing courts to invalidate not just the particular provisions deemed unconscionable but the entire agreement to arbitrate, even where the objectionable snippets of the contract can be easily excised and "the remainder of the arbitration agreement can still be enforced." Pet.

---

[3] In addition, this Court currently is considering *DIRECTV* v. *Imburgia*, No. 14-462, in which a California state court adopted a reading of an arbitration agreement that is so hostile to arbitration that the Ninth Circuit declared it "nonsensical" (*Murphy* v. *DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013)).

App. 8a (Gould, J., concurring in part and dissenting in part).

Indeed, *Armendariz* itself not only created an impermissible, arbitration-only rule governing severability, but applied that rule on top of unconscionability holdings that are themselves hard to reconcile with the FAA.

*Armendariz* was an action against an employer under the California Fair Employment and Housing Act (FEHA). The employees had signed agreements to arbitrate any wrongful termination or employment discrimination disputes. They argued, among other things, that multiple provisions of the agreement were unconscionable. The employees further contended that in the event the court found the provisions unconscionable, it should refuse to enforce the entire agreement rather than severing the objectionable provisions.

The California Supreme Court acknowledged that, under this Court's precedents, FEHA claims can sometimes be arbitrated. But it declared that agreements to arbitrate FEHA claims had to comply with "minimum requirements" unique to a "mandatory employment arbitration agreement" in order to be enforceable. *Armendariz*, 6 P.3d at 682. That is precisely what the FAA says state courts may not do: impose arbitration-specific rules to invalidate or constrain private agreements. See *Concepcion*, 563 U.S. at 333 ("Section 2's saving clause permits agreements to be invalidated by 'generally applicable contract defenses,' but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.").

In justifying its list of "minimum requirements" for arbitration agreements, the California Supreme Court appeared to believe that *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), empowered it to mandate any terms that in the court's view would ensure that plaintiffs could "fully vindicate" their state-law rights in arbitration. See *Armendariz*, 6 P.3d at 681 (citing *Gilmer*, 500 U.S. at 27-28). But as this Court has recently clarified, *Gilmer* said no such thing.

In fact, this Court has explained, "[t]he 'effective vindication' exception" applies only in limited circumstances, such as when "a provision in an arbitration agreement forbid[s] the assertion of certain statutory rights," and "perhaps * * * filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013). That limited exception does not come close to encompassing the extensive checklist of requirements that *Armendariz* imposes.

In addition, the "effective vindication" doctrine applies, if at all, only to "invalidate agreements that prevent the 'effective vindication' of a *federal* statutory right." *American Express*, 133 S. Ct. at 2310 (emphasis added); see also *id.* at 2320 (Kagan, J., dissenting) ("a *state* law," like FEHA, "could not possibly implicate the effective-vindication rule," because "[w]hen a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives"). As Justice Kagan put it, "[w]e have no earthly interest (quite the contrary) in vindicating [a state] law" that is inconsistent with the FAA, so the state law must "automatically bow" to federal

law; any effective-vindication exception that might possibly exist would "come[] into play only when the FAA is alleged to conflict with another *federal* law." *Ibid.*

*Armendariz* flouted the FAA in another respect. The court thought the agreement in the case invalid because it was a contract of adhesion that required "arbitration of employee—but not employer—claims arising out of a wrongful termination." 6 P.3d at 694. That lack of perfect mutuality with respect to the claims subject to arbitration, the court held, rendered the arbitration agreement unconscionable.

Numerous other courts, however, including "[m]ost federal courts," have rejected *Armendariz*'s "mutuality" requirement for arbitration contracts otherwise supported by adequate consideration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 & n.35 (Tex. 2001) (collecting cases); see also *Soto* v. *State Indus. Prods., Inc.*, 642 F.3d 67, 76-77 (1st Cir. 2011); *Oblix, Inc.* v. *Winiecki*, 374 F.3d 488, 490-91 (7th Cir. 2004).

Indeed, California in other contexts does not require every provision of every contract to be mutual. To the contrary, "[i]f the requirement of consideration is met, there is no additional requirement of * * * equivalence in the values exchanged, or mutuality of obligation." *Foley* v. *Interactive Data Corp.*, 765 P.2d 373, 381 n.14 (Cal. 1988) (internal quotation marks omitted); see also Restatement (Second) of Contracts § 79(c) (1981) ("If the requirement of consideration is met, there is no additional requirement of * * * 'mutuality of obligation.'").

Imposing an arbitration-specific mutuality rule therefore contravenes the FAA's bar on state-law

rules that "singl[e] out arbitration provisions for suspect status." *Doctor's Assocs.*, 517 U.S. at 687; see also, *e.g.*, *Concepcion*, 563 U.S. at 349; *Perry*, 482 U.S. at 492 n.9.

The *Armendariz* court also violated this Court's precedents in announcing a blanket rule that "the employer must bear the arbitration forum costs" in an "employment arbitration agreement." 6 P.3d at 689. That rule is inconsistent with *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79 (2000), which held that "the party seeking to avoid arbitration on the ground that arbitration would be prohibitively expensive * * * bears the burden of showing the likelihood of incurring such costs." *Id.* at 92.

In light of *Green Tree*, numerous federal courts have concluded that provisions requiring that arbitration forum costs be shared do not automatically render an arbitration agreement invalid. Rather, in each case the party seeking to avoid arbitration must first satisfy the court that the costs faced in arbitration actually will be prohibitive.[4] *Armendariz*'s blan-

---

[4] In the Fourth Circuit's words, "the appropriate inquiry * * * focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." *Bradford* v. *Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001). See also, *e.g.*, *Musnick* v. *King Motor Co.*, 325 F.3d 1255, 1259 (11th Cir. 2003) ("After *Green Tree*, an arbitration agreement is not unenforceable merely because it may involve some 'fee-shifting.'"); *LaPrade* v. *Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 708 (D.C. Cir. 2001) ("LaPrade makes no claim that the possibility of a large assessment arising from arbitration * * * prevented her from attempting to vindicate her rights."); *Williams* v. *Cigna Fin. Advisors Inc.*, 197 F.3d 752, 764 (5th Cir. 1999) ("Williams has not demonstrated that the arbi-

ket rule on the allocation of arbitral fees directly conflicts with those cases, which are far more faithful to *Green Tree*.

In short, *Armendariz*'s "multiple defects" anti-severability rule was tied to substantive limitations on the enforceability of arbitration agreements that are themselves highly suspect under the FAA. Both aspects of *Armendariz* stem from the same underlying hostility to enforcement of arbitration agreements—the very hostility that the FAA was enacted to eliminate.

* * *

*Armendariz*'s arbitration-only severance rule disfavors arbitration in purpose and effect. Because the FAA forecloses precisely this type of "judicial hostility towards arbitration" (*Concepcion*, 563 U.S. at 342), the decision below cannot stand.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

---

trators' order that he pay one-half of the forum fees prevented him from having a full opportunity to vindicate his claims effectively.").

Respectfully submitted.

KATE COMERFORD TODD
WARREN POSTMAN
*U.S. Chamber Litigation Center, Inc.*
*1615 H Street, NW*
*Washington, DC 20062*
*(202) 463-5337*

ANDREW J. PINCUS
*Counsel of Record*
ARCHIS A. PARASHARAMI
*Mayer Brown LLP*
*1999 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*
*apincus@mayerbrown.com*

*Counsel for* Amicus Curiae

DECEMBER 2015